

carrier service,"^{24/} the carrier made no showing whatever of "substantial cause" for any of the dramatic changes the tariffs would work on the parties' agreements.

While earlier GTE Telephone filings imply that the Commission has compelled its filing of these tariffs, in fact the Commission has never -- not in its 1989 grant of Section 214 authority, not in its November 1993 rescission order on remand, and not in its December 1993 denial of a stay pending appeal -- directed GTE Telephone to file tariffs.^{25/} Moreover, even if some form of tariff were deemed permissible, it is absolutely indefensible to contend that these tariffs, which are at odds with many elements of the Apollo/GTE Telephone contracts, are what either the statute requires or the Commission may approve.

In failing even to attempt an explanation of the tariffs' departures from the carrier's existing contracts with Apollo -- much less to offer a "substantial cause" showing for those changes -- GTE Telephone's submissions are fatally deficient.

^{24/} Transmittal No. 873, Description and Justification (hereinafter "D&J (873)"), p. 1. See also Transmittal No. 874, Description and Justification (hereinafter "D&J (874)"), p. 1

^{25/} In fact, the Commission called for the submission of a "compliance plan," 8 F.C.C. Rcd. at 8754. If any suggestion of a compliance approach could be read from the Commission's 1993 order, it was that some new form of Section 214 application might be appropriate, 8 F.C.C. Rcd. at 8181 ("If GTECA's proposed action in this regard requires prior approval by the Commission (e.g., Section 214 certification to offer channel service or video dialtone service), GTECA must [timely] submit any necessary filings . . .").

CONCLUSION

As demonstrated herein, the terms of the Transmittal No. 873/893 tariff are at odds with specific portions of the earlier contracts between Apollo, on the one hand, and GTE Telephone and GTE Service, on the other. Moreover, the new operational scheme represented by the tariff is in direct conflict with the structure established by the earlier Apollo/GTE agreements.

To that extent, GTE Telephone's tariff is an unlawful effort to abrogate its earlier contracts with Apollo. Moreover, the carrier's failure adequately to demonstrate "substantial cause" for the tariff's departures from the earlier agreements reinforces the need for rejection of the Transmittal No. 873/893 tariff.

Respectfully submitted,

APOLLO CABLEVISION, INC.

By: 

Edward P. Taptich
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August 15, 1994

Its Attorneys

ATTACHMENTS

ATTACHMENT 1	Design Agreement
ATTACHMENT 2	Construction Agreement
ATTACHMENT 3	Amendment No. 1 to Construction Agreement
ATTACHMENT 4	Maintenance Agreement
ATTACHMENT 5	Amendment No. 1 to Maintenance Agreement
ATTACHMENT 6	Agreement for the Installation of Customer Premises CATV Equipment
ATTACHMENT 7	CATV Installation Agreement
ATTACHMENT 8	Lease Agreement
ATTACHMENT 9	Amendment No. 1 to Lease Agreement
ATTACHMENT 10	Amendment No. 2 to Lease Agreement
ATTACHMENT 11	Amendment No. 3 to Lease Agreement
ATTACHMENT 12	Service Agreement
ATTACHMENT 13	Amendment No. 1 to Service Agreement
ATTACHMENT 14	Enhanced Capability Decoder (Converter Box) Agreement
ATTACHMENT 15	City of Cerritos Ordinance No. 659

DESIGN AGREEMENT

This Design Agreement is entered into this 22nd day of January, 1987, between T. L. Robak, Inc. (the "Contractor") and General Telephone Company of California ("GTC").

Recitals

This Agreement is entered into with reference to the following agreed facts:

A. The Contractor and its wholly-owned subsidiary, Apollo Cablevision, Inc., and the Owner and its related entity, GTE Service Corporation ("GTE"), have entered into negotiations with the City of Cerritos, California ("City"), relevant to the construction of an underground electrical signal transmission facility (the "System") to be used in part to provide cable television ("CATV") service in the City pursuant to a CATV Contract between the City and Apollo Cablevision, Inc.

B. In connection with those negotiations, the Contractor and GTC have preliminarily agreed that the Contractor will construct the System for GTC pursuant to certain terms and provisions which will be contained in a Construction Agreement to be entered into by the parties.

C. The parties have already preliminarily agreed that the cost for the design of the System will be accomplished by the Contractor for the sum of \$128,000.00, including the cost of any initial System design work and site survey. A more detailed description of the design of the System to be prepared by the

Contractor is set forth in Exhibit "A" to this Agreement and by this reference incorporated herein.

NOW THEREFORE, the parties hereby agree as follows:

1. GTC hereby agrees to pay Contractor the sum of \$128,000.00 upon execution of this Agreement. Contractor agrees, within two days following receipt of said sum, to commence preparation of the detailed description of the System to be designed (the "Design Specifications and Construction Methods") and to furnish the CATV portion of such Design Specifications and Construction Methods to GTC within 10 working days following said receipt for review and approval. Upon receipt of the CATV portion of the Design Specifications and Construction Methods, GTC and GTE shall complete the Design Specifications and Construction Methods to their satisfaction and the parties thereafter will obtain any approvals of the Design Specifications and Construction Methods by the City of Cerritos.

2. Upon receipt of the completed Design Specifications and Construction Methods, Contractor agrees to proceed diligently to complete the design in an expeditious manner. GTC and GTE herein reserve the right to participate in and approve any design prepared by Contractor pursuant to this Agreement.

3. The parties agree that receipt of this sum will be reflected in the Construction Agreement to be executed between Contractor and GTC. In the event however, that the System is not constructed by Contractor, Contractor shall retain the entire sum of \$128,000.00 as reimbursement for the time, money and expense expended in connection with the negotiations relative to this

EXHIBIT "A"

TO THE DESIGN AGREEMENT DATED THE
22ND DAY OF JANUARY, 1987 BETWEEN
T. L. ROBAK, INC. AND GENERAL
TELEPHONE COMPANY OF CALIFORNIA

DESCRIPTION OF THE DESIGN OF THE SYSTEM

The various components of the design to be prepared by T. L. Robak, Inc. include:

1. General System Design Routing.
2. Detailed Conduit Layout.
 - a. CATV
 - b. Test Bed
 - c. Telephone
3. Head-End Specifications and Design Layout.
4. Antenna/Satellite Dish Design Layout.
5. Cable Design of Coaxial CATV Facility (including, but not limited to, locations of amplifiers, taps, and power supplies).
6. Electrical Design of 550 MHz signal, including, but not limited to, signal input-output levels, noise levels, interference limitations, slope requirements, and grounding.
7. Construction Methods.


transaction and the production of the complete design of the System. Whether or not the System is constructed, any design or drawings or copies thereof prepared pursuant to this Agreement shall be immediately delivered to GTC and shall be owned exclusively by GTC.

IN WITNESS WHEREOF, this Agreement is executed on the day and year indicated above.

General Telephone Company
of California

By _____

T. L. Robak, Inc. .

By _____

CONSTRUCTION AGREEMENT

This Construction Agreement is entered into this 22nd day of January, 1987, between T. L. Robak, Inc. (the "Contractor"), Contractor's license number 437591, and General Telephone Company of California (the "Owner").

Recitals

This Agreement is entered into with reference to the following agreed facts:

A. The Contractor and its wholly-owned subsidiary, Apollo Cablevision, Inc., and the Owner and its related entity, GTE Service Corporation ("GTE"), have entered into negotiations with the City of Cerritos, California ("City"), relevant to the construction of an underground electrical signal transmission facility (the "System") to be used in part to provide cable television ("CATV") service in the City pursuant to a CATV Contract between the City and Apollo Cablevision, Inc. Said facilities shall be initially constructed by the Owner pursuant to a franchise agreement between the City and the Owner.

B. The purpose of this Construction Agreement is to set forth the terms and conditions relative to the construction of the System by the Contractor for the Owner.

NOW THEREFORE, the parties hereby agree as follows:

1. Employment of Contractor. The Owner agrees to employ the Contractor to construct the System described in detail in Exhibit "A" to this Agreement (and by this reference incorporated

herein), and Contractor agrees to construct said System as described in Exhibit "A" pursuant to the terms and provisions of this Construction Agreement. The Design Specifications and Construction Methods of the System shall be prepared pursuant to the terms of the Design Agreement between Contractor and Owner, the terms and conditions of which by this reference are incorporated herein. Upon completion, the Design Specifications and Construction Methods shall be attached to this Agreement as Appendix 4 to Exhibit "A" and by this reference incorporated herein.

2. Payment. The payment to Contractor by Owner for the performance of the services required by the terms of this Construction Agreement shall be as follows:

(a) The sum of \$128,000.00 payable in cash in accordance with the Design Agreement between Contractor and Owner.

(b) The sum of \$750,000.00 payable in cash upon the occurrence of all of the following:

(i) the execution of this Construction Agreement;

(ii) the second public reading of the Franchise Agreement between the City of Cerritos and the Owner, referred to in paragraph A, above; and

(iii) the second public reading of the CATV Contract between the City of Cerritos and Apollo Cablevision, Inc., referred to in paragraph A, above.

(c) Monthly progress payments based upon construction progress commencing on the first day of the month following the commencement of construction by the Contractor and continuing monthly until the System has been completed to the mutual satisfaction of: (i) the Contractor; (ii) the Owner; and (iii) the City of Cerritos. The monthly construction progress payments will be that sum of money determined by the Cost Table attached hereto as Exhibit "B" (and by this reference incorporated herein), based upon the work performed each month as certified to Owner by Owner's designated Project Manager (or his authorized designee) and paid to Contractor within 30 days. A late payment charge equal to 1.5 per cent per month, or the maximum rate allowed by law, whichever is less, will apply to each such payment which is received after the 30-day period.

3. Purchase of Supplies and Equipment. In addition to the payments by Owner to Contractor set forth in paragraph 2, the parties agree that the supplies and equipment necessary to construct the System will be paid for by the Owner pursuant to the following procedure:

(a) The Bill of Materials for the System, attached as Appendix 3 to Exhibit "A," represents the parties' present estimate of all the supplies and equipment necessary to construct the System. The parties reserve the right to make additions to (or deletions from) the Bill of Materials subject to the concurrence of such additions or deletions by the Owner, as recommended by Contractor.

(b) From time to time Contractor will prepare an order of the supplies and equipment as are reasonably required to construct the System in an orderly and systematic manner from the items listed on the Bill of Materials from such suppliers as the Owner chooses. The orders will be presented to the Owner's Project Manager (or his authorized designee) for approval prior to presentation to the supplier. Following approval of each order, Contractor will make necessary arrangements for the timely delivery of the specified supplies and materials. Payment invoices for such orders will be presented by the suppliers directly to the Owner for payment. Contractor shall have no responsibility for the payment of such supplies or equipment. Owner warrants to pay such invoices in a timely manner pursuant to the agreed payment terms with the supplier in order to assure an uninterrupted flow of such items of supply required to construct the System.

4. Insurance; Indemnity. Contractor will provide all insurance as may be required by the Workers' Compensation Act of the State of California and will furnish Owner with general and public liability insurance in amounts not less than \$2,000,000.00 for any one person, and \$2,000,000.00 per occurrence; property damage liability insurance of not less than \$2,000,000.00; and liability insurance to indemnify and hold Owner harmless from any loss, claim, liability or demand, including attorney's fees, arising out of the work performed by Contractor. Contractor shall provide Owner with certificates of said insurance naming Owner as loss payee as its interest may appear as to each of the foregoing

insurance policies. Contractor agrees that any and all subcontractors employed by Contractor shall maintain sufficient and reasonable (i) workers' compensation insurance, if required, and (ii) general liability insurance. In addition to the foregoing insurance contract obligations of Contractor, Contractor agrees that it shall indemnify and hold Owner harmless from any and all liability, claims, and demands whatsoever, including attorney's fees, as a result of the negligence or other wrongdoing on the part of any employee, agent, servant or representative of Contractor, or any subcontractor permitted by Owner to be engaged by Contractor. This indemnity shall include, but not be limited to, any and all liability, claims and demands whatsoever made by reason of the termination, disturbance, interruption or other interference with services of any type of aerial or underground installation, utility or other facility damaged, harmed, disturbed or caused to be disturbed by Contractor or any of its employees, agents, servants or representatives or by any subcontractor permitted to be engaged hereunder in connection with the construction of the System.

5. Surety Bond. Contractor shall, on demand of Owner at any time during the continuance of this Agreement, secure and furnish to Owner at the sole cost and expense of Owner a bond issued by a corporate surety authorized to issue surety insurance in California in an amount equal to seventy-five percent (75%) of the contract price securing the faithful performance by Contractor of this contract.

6. Fees and Licenses. Contractor shall furnish and timely pay for all State, County and Municipal licenses as may be required from time to time by such entities with respect for the work to be performed by Contractor.

7. Standards of Construction. Contractor agrees that the System will be constructed in accordance with Owner's standard practices and engineering specifications and in accordance with all applicable safety and electrical codes, joint trench agreements, franchises, state statutes and regulations, city or county ordinances, National Electrical Safety Code, and other such regulations as may be applicable for proper construction of said System. Deviations from the above construction practices shall be permitted only upon written order from the Owner or its authorized representative. Contractor warrants that all work performed by Contractor as provided for herein shall be free from defects in workmanship, and that for a period of 36 months following completion of construction as to each phase, within ten days after receipt of written notice, Contractor will, at its own expense (including the cost of materials required for replacement) correct any and all defects. Owner will have the right to access all work locations and inspect, test and verify all work applications as deemed necessary. Additionally, Owner has the right to stop construction until such time as any specification design dispute is resolved. Contractor and Owner agree that any such stoppage will not be cause for penalty to either party.

8. Notification of Residents. Contractor agrees to notify all residents whose property or enjoyment of property will be

affected in any way by such underground construction in accordance with the requirements of the City.

9. Supervisory Control. Contractor shall maintain adequate supervisory personnel on the job to perform and carry out the terms of this Construction Agreement in an expeditious manner. Contractor shall identify a person acceptable to Owner as Construction Supervisor for this contract. Said Construction Supervisor shall undertake all efforts that are reasonable and necessary to the performance of this Agreement. The terms of this paragraph shall in no way restrict the right of the Contractor to terminate the Construction Supervisor's employment by the Contractor, so long as a replacement acceptable to Owner is promptly made by Contractor.

10. Easements and Rights-of-Way. Owner shall be responsible for securing all trenching permits. Easements or rights-of-way which may be required to complete construction of the System shall be the responsibility of Contractor. When the System is required to go outside of the area covered by the franchise agreement between the City of Cerritos and the Owner, Contractor shall also be responsible for securing all trenching permits, easements or rights-of-way at Owner's expense.

11. Commencement of Construction. Contractor agrees to commence construction of the System within 30 days after receipt of the sum of \$750,000.00 referred to in paragraph 2(b) of this Agreement, or such date thereafter as Owner shall reasonably specify, and shall proceed with such work in a continuous and orderly manner until the System has been completed.

12. Construction Schedule. The Construction Schedule shall be determined by mutual agreement of Owner, Contractor and City.

13. Subcontracts. Contractor may enter into subcontracts for the performance by the Contractor of its obligations hereunder, provided, however, such subcontract agreements shall not release Contractor from any of its obligations to the Owner hereunder.

14. Force Majeure; Assignments. In the event that strikes, acts of God, embargoes, acts of government, fires, floods, the inability of vendors to deliver necessary materials, or other restrictions cause delays in construction, this Agreement shall be extended for a period equivalent to such delays. Contractor and Owner agree that such delays will not be cause for penalty to either party. This Agreement is personal between Owner and Contractor and shall not be assigned by either party hereto without the express written consent of the other party and any purported assignment without such consent shall be void. In the event of permitted assignment, this Agreement will be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors and permitted assigns.

15. Notices to Parties. Any notice, request, consent or demand herein required or permitted shall be in writing and will be deemed given if delivered in person or sent certified or registered mail, return receipt requested, postage prepaid, addressed to the appropriate party as follows:

Owner:
General Telephone Company of California
One GTE Place, RC 3300
Thousand Oaks, California 91362-3811
Attention:

Contractor:
T. L. Robak, Inc.
Post Office Box 4659
San Luis Obispo, California 93403
Attention:

The address to which notices shall be sent may be changed by either party upon written notice to the other in accordance with the procedures set forth in this paragraph.

16. Acceptance and Completion of Construction. The System shall be deemed accepted upon written notice of completion or partial completion signed by the Owner, the Contractor, and the City.

17. Express Contingencies. This Agreement is contingent upon City approval of the design of the System, the award of the CATV Contract between the City and Apollo Cablevision, Inc., the award of a franchise agreement in the City to Owner and any necessary regulatory agency approvals.

18. Entire Agreement; Waiver of Default; Costs of Suit. Time is of the essence of this Agreement. This Agreement contains the entire agreement between Owner and Contractor and no modification of this Agreement shall be effective unless in writing and executed by an executive officer of both parties. A waiver of default shall not be a waiver of any other or subsequent default. In the event either party hereto initiates an appropriate legal action to enforce the terms and provisions of this Agreement, the prevailing party in such action may recover its cost of suit, including reasonable attorney's fees.

IN WITNESS WHEREOF, this Agreement is executed on the day and year indicated below.

OWNER

GENERAL TELEPHONE COMPANY
OF CALIFORNIA

By

Date 1/22/87

Attest:

Kenneth K. Oshel
Assistant Secretary

CONTRACTOR

T. L. ROBAK, INC.

By

Date 1/22/87

Attest:

Raymond H. Bishop
Corporate Secretary

EXHIBIT "A"

TO THE CONSTRUCTION AGREEMENT
DATED THE 22ND DAY OF JANUARY, 1987
BETWEEN T. L. ROBAK, INC. AND GENERAL
TELEPHONE COMPANY OF CALIFORNIA

CONSTRUCTION DESIGN DETAILS OF THE UNDERGROUND ELECTRICAL SIGNAL
TRANSMISSION FACILITY (THE "SYSTEM") TO BE CONSTRUCTED AND
OPERATED IN THE CITY OF CERRITOS, CALIFORNIA

Table of Contents

Appendix 1	Maps of System
Appendix 2	Schedule of Construction Phases
Appendix 3	Bill of Materials
Appendix 4	Design Specifications and Construction Methods of System
Appendix 5	Investment Estimate Table

EXHIBIT "B"

TO THE CONSTRUCTION AGREEMENT
DATED THE 22ND DAY OF JANUARY, 1987
BETWEEN T. L. ROBAK, INC. AND GENERAL
TELEPHONE COMPANY OF CALIFORNIA

Cost Table

1. Street Trenching

Trench in asphalt streets, 6" wide, at the depth indicated below, place CATV conduit, push CATV cable, set CATV pedestal/vaults, back fill with two-sack slurry and repave with 2" asphalt cap, splice CATV cable and balance CATV system

Price at 12" depth - \$4.59 per foot; Price at 24" depth - \$7.39 per foot (placing other conduit up to 3" concurrent with CATV conduit, add \$.50 per foot) (pushing other cable up to 3" concurrent with CATV conduit, add \$.50 per foot)

2. Boring (if trenching not acceptable or appropriate)

2" conduit, 0-5 ft. - \$6.00 per linear foot; 2" conduit, 5-10 ft. - \$8.00 per linear foot; 2" conduit, 10-40 ft. - \$12.00 per linear foot; 3" conduit - add \$3.00 per linear foot to the above prices

3. Cut and Replace Streets & Sidewalks

Asphalt - \$4.75 per square foot; Concrete - \$6.75 per square foot

4. Placing of Additional Pedestals or Boxes

Small (11" x 17") - \$12.00 each; Medium (18" x 24") - \$22.50 each; Large (17" x 30") - \$45.00 each; Other - to be negotiated

5. Installation in Existing City Conduit

Coaxial cable - \$.50 per foot; Fiber optic cable - \$.50 per foot; Pulling sub-duct bundle (3 one-inch cables) - \$1.00 per foot (locate and repair of existing conduit = \$55.00 per 1 hour)

6. Price to Set Power Supplies

\$450.00 each

7. System Design

\$128,000.00

8. Head-End Installation
\$3,800.00

9. House Drop Installation
12" depth - \$80.00 per house

AMENDMENT NO. 1 TO
CONSTRUCTION AGREEMENT

This Agreement is entered into as of the 26th day of May, 1988, between GTE California Incorporated, formerly known as General Telephone Company of California ("GTEC" or "Owner") and T. L. Robak, Inc. ("Robak").

Recitals

This Agreement is entered into with reference to the following agreed facts:

A. Robak entered into a Construction Agreement with GTEC on January 22, 1987 (the "Construction Agreement") to construct an underground electrical signal transmission facility (the "System") in the City of Cerritos, California (the "City").

B. Paragraph 17 of the Construction Agreement stated that the agreement was expressly contingent upon "any necessary regulatory agency approvals." In order to seek such regulatory agency approvals, GTEC filed an Application for authority pursuant to Section 214 of the Communications Act of 1934 with the Federal Communications Commission (the "FCC") to construct and maintain broadband transport facilities in the City. In a Memorandum Opinion, Order and Certificate issued by the Chief, Common Carrier Bureau of the FCC adopted April 8, 1988 and released April 12, 1988 (File No. W-P-C-5927), the requisite regulatory agency approvals were obtained.

C. Paragraph 11 of the Construction Agreement requires Robak to commence construction of the System in the City within

thirty (30) days after a date specified by GTEC and to "proceed with such work in a continuous and orderly manner until the System has been completed." Robak's obligation is expressly subject to the Force Majeure provisions of paragraph 14 of the Construction Agreement which states that "in the event that strikes, acts of God, embargos, acts of government, fires, floods, inability of vendors to deliver necessary materials, or other restrictions cause delays in construction, this [a]greement shall be extended for a period equivalent to such delays."

D. The parties are aware, however, that the California Cable Television Association ("CCTA") and the National Cable Television Association, Inc. ("NCTA") (which entities filed petitions before the FCC to deny the application of GTEC for authority) have appealed the order issued by the Chief, Common Carrier Bureau to the full FCC and have publicly announced that they will pursue their appeal through appellate judicial action if necessary. Both the CCTA and the NCTA have indicated they will seek to enjoin the construction of the System during the pendency of these appeals.

E. While neither GTEC nor Robak believes that the CCTA and/or the NCTA will prevail in their attempt to enjoin construction of the System by their threatened appeal, the parties acknowledge that such appellate action could result in an unforeseen delay of indeterminate length which could create serious economic and practical problems for Robak as Robak must maintain equipment and crews in a state of readiness to commence or continue the construction effort during such delay.